Supreme Court, U.S.
FILED
MAY 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1779

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

THE SYNANON CHURCH,
Petitioner,

v.

STUART A. BERNSTEIN, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF OF RESPONDENTS BERNSTEIN AND KUSHNER IN OPPOSITION

Warren K. Kaplan
(Counsel of Record)
William Daniel Sullivan
Neal Goldfarb

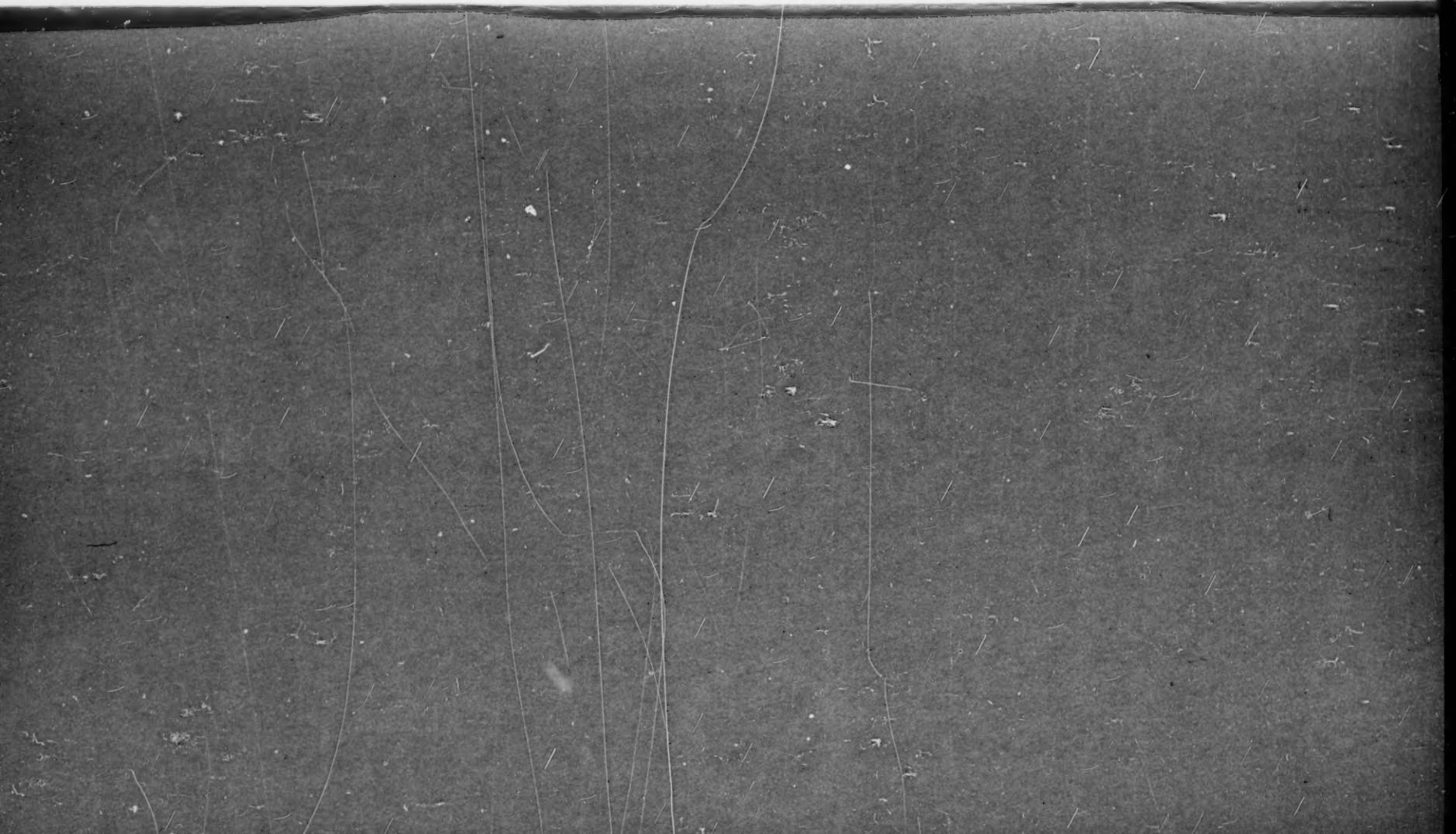
Melrod, Redman & Gartlan
A Professional Corporation
1801 K Street, N.W.
Suite 1100K
Washington, D.C. 20006
(202) 822-5300

Attorneys for Respondents
Stuart A. Bernstein and
Samuel J. Kushner

May 30, 1986

CASILLAS PRESS INC. – 1717 K ST NEW WASHINGTON DC 20006 – 223-1220

25 pp



QUESTIONS PRESENTED

The Superior Court of the District of Columbia found by clear and convincing evidence that petitioner The Synanon Church had deliberately destroyed material evidence and had perpetrated a fraud on the court by, among other things, lying about that destruction to the court in order to cover it up. Based on those findings, the court dismissed Synanon's complaint. The District of Columbia Court of Appeals affirmed the dismissal and did not disturb the Superior Court's conclusion that the evidence Synanon had destroyed was material to the merits of Synanon's complaint.

The questions actually presented by the decision below are as follows:

1. Whether this Court should exercise its certiorari jurisdiction to review the decision of the District of Columbia Court of Appeals where that decision turned solely on the local law of the District of Columbia and raised no issues of constitutional or other federal law.

2. Whether there is any real conflict between the decision below and the cases, cited by Synanon, holding that dismissal of the complaint is proper as a sanction for the plaintiff's misconduct in connection with the litigation only if that misconduct related to matters material to the plaintiff's claim, where the Court of Appeals did not hold that the element of materiality is unnecessary and did not disturb the trial court's finding that Synanon's misconduct was in fact material.

3. Whether the issue as to which the petition seeks review was raised below and properly presented in the petition.

LIST OF PARTIES

The parties below were plaintiff Synanon Foundation, Inc. (now known as The Synanon Church), and defendants Stuart A. Bernstein, Samuel J. Kushner, Coldwell Banker & Co., and James H. Kabler, III.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

REASONS WHY THE PETITION SHOULD BE DENIED

I. This Case Does Not Raise the Issues Petitioner Asks this Court to Review 5

II. The Question Whether the Evidence Synanon Destroyed Was Material Turns Completely on Interpretation of the Local Law of the District of Columbia and Is Therefore Inappropriate for Review by this Court 8

III. The Question as to Which Synanon Seeks Review Was Not Raised Below or Properly Presented in the Petition 10

CONCLUSION 12

TABLE OF AUTHORITIES

Cases: Page

Adickes v. S.H. Kress and Co.,
398 U.S. 144 (1970) 11

Bob Jones University v. United States,
461 U.S. 574 (1983) 9, 10

Delta Air Lines, Inc. v. August,
450 U.S. 346 (1981) 11

Fisher v. United States,
328 U.S. 463 (1946) 9

Griffin v. United States,
336 U.S. 704 (1949) 9

Keller v. Adams-Campbell Co.,
264 U.S. 314 (1924) 5, 7

Layne & Bowler Corp. v. Western Well Works, Inc.,
261 U.S. 387 (1923) 8

Pernell v. Southall Realty,
416 U.S. 363 (1974) 9

Reavis v. United States,
395 A.2d 75 (D.C. 1978) 8

Rescue Army v. Municipal Court,
331 U.S. 549 (1947) 7

San Luis Obispo Mothers for Peace v. United States Nuclear Regulatory Commission, No. 84-1410
(D.C. Cir. April 25, 1986) (en banc) 6

Simmons v. West Haven Housing Authority,
399 U.S. 510 (1970) 7

Smith v. Butler,
366 U.S. 161 (1961) 5, 7

Page

United States v. Frady,
456 U.S. 152 (1982) 9

United States v. Santana,
427 U.S. 38 (1976) 11

Weinstock v. United States,
231 F.2d 699 (D.C. Cir. 1956) 8

Statutes and Rules

28 U.S.C. § 1257 12

I.R.C. § 501(c)(3) 4

S. Ct. R. 21.1(a) 11

S. Ct. R. 21.1(h) 11, 12

District of Columbia Zoning Regulations § 4104.44 2

Other Authorities:

1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.402[2] (1984) 7

1 J. Weinstein & M. Berger, *Weinstein's Evidence* §401[04] (1985) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1779

THE SYNANON CHURCH,
Petitioner,

v.

STUART A. BERNSTEIN, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF OF RESPONDENTS BERNSTEIN AND KUSHNER IN OPPOSITION

Respondents Stuart A. Bernstein and Samuel J. Kushner respectfully request that this Court deny the petition for certiorari, seeking review of the decision of the District of Columbia Court of Appeals in this case. That decision is reported at 503 A.2d 1254.

STATEMENT OF FACTS

Because the petitioner has misstated the holdings of both the trial court and the Court of Appeals, and because it has omitted relevant details concerning the matters at issue below, we are compelled to restate the facts here rather than rely on the petitioner's statement.

Petitioner The Synanon Church ("Synanon") began this action by a complaint seeking a decree of rescission of its contract to purchase an apartment building from respondents Stuart A. Bernstein and Samuel J. Kushner (referred to here as "the owners"). Synanon's purpose in contracting to buy the building was to obtain space it could use, in part, for office purposes. Under the applicable zoning regulations, the building could be used as offices only by "non-profit organizations." D.C. Zoning Regulations § 4104.44. Synanon alleged itself to be such an organization. Synanon alleged in its complaint that the owners' real estate agent fraudulently misrepresented the building's floor-load capacity as sufficient for office use under the District of Columbia Building Code.

Among the owners' defenses to the complaint were several arguments based on their contention that Synanon was not a peaceful, law-abiding charitable organization, but was instead a cult that had adopted a policy of violence and terrorism directed against its perceived enemies.[1] The owners argued that Synanon's policy of violence disqualified it from being a "non-profit organization" under the local zoning regulations, which meant that it could not have used the building for offices as it had intended, and therefore that the owners' alleged misrepresentation that the building was suitable for office use was

---

[1]Perhaps the best-known instance in which this policy was put into action was Synanon's attempt to murder Paul Morantz, an attorney who represented clients in litigation against Synanon, by placing a rattlesnake in his mailbox. *See* Appendix to Petition for Certiorari ("Pet. App.") at 42a-43a. Synanon founder and leader Charles Dederich pleaded nolo contendere to charges of conspiracy to commit murder arising from this attack. *See* Exhibit 203 to Defendants' Request for Admissions and Interrogatories to Plaintiff (Oct. 29, 1982); Plaintiff's Response to Defendants' Designation of Specific Incidents of Violence 160 (Sept. 7, 1983).

immaterial. The owners also contended that Synanon was not entitled to the equitable remedy of rescission because its own hands were unclean in that it had fraudulently passed itself off as a non-violent, law-abiding organization when in fact it was devoted to violence. Finally, the owners contended that the real basis for Synanon's decision to seek rescission was not its inability to use the building for office space but the hostile reaction of the building's tenants, who strongly opposed Synanon's purchase of the building after an NBC News documentary exposed it as a violent cult.

The owners began discovery directed at obtaining from Synanon certain specifically enumerated documents and tapes that they believed contained evidence of Synanon's policy of violence. The materials sought were tapes and transcripts of the pronouncements of Synanon's leader, Charles Dederich, and any indices of those tapes and transcripts. Synanon successfully resisted most of this discovery for more than four years on the basis of the sworn representations of its in-house counsel and the testimony of its top corporate officials that the materials requested did not exist. In reliance on these representations, the Superior Court for the most part denied respondents' motions to compel and for sanctions. (For a more complete account of the discovery proceedings below, see Pet. App. 10a-13a.)

Shortly before trial, however, the owners obtained evidence that Synanon had systematically destroyed a great many responsive documents under the direction of its in-house counsel and had covered up this destruction by the perjury of its top officials, again under the direction of its in-house counsel. The Superior Court held an eleven-day evidentiary hearing on those allegations, at which two

former Synanon members who had witnessed and participated in this scheme testified.

The court found that their testimony clearly and convincingly showed "a wilful, deliberate and purposeful scheme to . . . destroy extensive amounts of evidence and discoverable materials which probably would have had a dispositive bearing on Synanon's complaint . . . ." Pet. App. 63a. The court found that the evidence that had been destroyed was material to the question whether Synanon qualified as a non-profit organization eligible to use the building for office purposes under the local zoning regulations, an issue the court found to be "inextricably involved in the entitlement of Synanon to recover." Pet. App. 41a.[2] The court further found that Synanon had concealed this scheme by presenting false testimony and by making false representations in court. *Id.* at 63-64a. The court characterized Synanon's scheme as a "gross fraud upon the court of the most grave and serious proportions" and concluded that the entire course of wrongful conduct had been orchestrated by Synanon's "high officers" and its in-house legal department. Pet. App. 62a-63a. Based on these findings, the court held that the only appropriate sanction was dismissal of Synanon's complaint. Pet. App. 64a.

The District of Columbia Court of Appeals affirmed the Superior Court's action. The Court of Appeals based its decision on the fraud Synanon had perpetrated on the court through the misrepresentations of its attorneys and did not consider whether Synanon's destruction of evidence provided an independent basis for the dismissal.

---

[2]Contrary to Synanon's contention, Petition for Certiorari ("Pet.") 5, the Superior Court did not state that Synanon's qualification for non-profit status under the zoning regulations turned on whether Synanon was a tax-exempt organization under I.R.C. § 501(c)(3).

Significantly, the Court of Appeals did not disturb the Superior Court's finding that the evidence that had been destroyed and the misrepresentations by which the destruction was covered up were relevant to the merits of Synanon's complaint. There is no indication in the opinion of the Court of Appeals that the court disagreed with the Superior Court's conclusion on this point. The Court of Appeals simply did not discuss the issue of materiality. The only discussion of materiality by any member of the panel was contained in the separate statement of Judge Mack, who stated her personal belief that the evidence destroyed was not material to Synanon's complaint. Pet. App. 21a-37a. Neither of the other judges on the panel joined in that statement, however.

REASONS WHY THE PETITION SHOULD BE DENIED

I. This Case Does Not Raise the Issues Petitioner Asks this Court to Decide.

Supreme Court review of the decision in this case is inappropriate because the issue that Synanon would have this Court review is not presented by the decision of either of the courts below or by the record. *Cf. Smith v. Butler,* 366 U.S. 161, 161 (1961) (certiorari dismissed as improvidently granted because decision under review "did not turn on the issue on the basis of which certiorari was granted."); *Keller v. Adams-Campbell Co.,* 264 U.S. 314 (1924) (certiorari dismissed as improvidently granted where decision under review did not really pose the issue stated in the petition).

Simply put, Synanon has misstated the question before the Court. In its petition Synanon frames the question presented as whether due process allows the dismissal of a

complaint for the plaintiff's destruction of evidence and perpetration of a fraud on the court where the plaintiff's misconduct is not material to the merits of the plaintiff's claim. Pet. i, 6. The validity of that statement of the issue turns on Synanon's allegation that the District of Columbia Court of Appeals held "implicit[ly]" and "sub silentio" that the evidence Synanon destroyed and the lies Synanon told to cover that destruction up were not material to its complaint but that dismissal was warranted nevertheless.

But the Court of Appeals held nothing of the sort. The truth is that the Court of Appeals did not disturb the Superior Court's explicit finding that the evidence destroyed and the misrepresentations concealing its destruction were material. Nothing in the Court of Appeals's decision gives the slightest hint that the court found any fault in the Superior Court's finding of materiality. Indeed, Synanon can point to nothing in the opinion of the court below to support its reading of the decision, and instead relies entirely on the separate statement of Judge Mack, in which neither of the other members of the panel joined. But the statement of a single member of a three-judge panel does not constitute the opinion of the court. If the other members of the panel had agreed with Judge Mack's conclusion that the evidence destroyed was not material, they would presumably have joined in her statement. There is no rational reason why the views of a single judge should be attributed to the panel as a whole, absent some clear indication that the majority agreed with them. *Cf. San Luis Obispo Mothers for Peace v. United States Nuclear Regulatory Commission,* No. 84-1410, slip op. at 31-33 (D.C. Cir. April 25, 1986) (en banc) (statement of dissenting member of agency that agency considered cer-

tain factors is insufficient to establish that such factors were in fact considered).[3]

Consequently, the Superior Court's finding that the evidence destroyed was material remains in effect. *See* 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.402[2] at 29 n.17 (1984) ("to the extent that the court of appeals does not consider issues decided by the District Court, the decision of the District Court remains a precedent within the district . . . ."). Because this case does not properly present the question that Synanon asks the Court to decide, the petition for certiorari amounts to a request that this Court render an advisory opinion on an abstract legal question. Whether or not that issue is otherwise "certworthy" – a question we do not address – this is not the case in which it should be decided. *See Smith v. Butler,* 366 U.S. 161; *Keller v. Adams-Campbell Co.,* 264 U.S. 314.

The fact that the Court of Appeals did not hold materiality to be unnecessary also means that the "conflict" that Synanon posits between the decision below and the

---

[3]Even if there were a possibility that one of the other panel members secretly agreed with Judge Mack's analysis, granting certiorari would be unwarranted because it would necessarily be based on speculation that the Court of Appeals *might* have held as Synanon argues it did. Such speculation provides far too shaky a basis for this Court to decide questions of constitutional law. *Cf. Simmons v. West Haven Housing Auth.,* 399 U.S. 510 (1970) (appeal dismissed because ambiguity as to basis for decison below made it unclear whether constitutional issue was properly before the Court); *Rescue Army v. Municipal Court,* 331 U.S. 549, 576 (1947) (Court refrains from deciding constitutional issue due to ambiguity as to exactly what state court had decided; to decide constitutional question in those circumstances "would be directly contrary to the policy of avoiding constitutional decisons until the issues are presented with clarity, precision, and certainty").

cases holding that materiality is required is illusory. The Court of Appeals' decision is in no way inconsistent with the cases on which Synanon relies to establish a conflict. Synanon's imagined "conflict" therefore provides no basis for this Court to grant certiorari here. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923) (certiorari dismissed as improvidently granted where decision on review was not really in conflict with other cases).

II. The Question Whether the Evidence Synanon Destroyed Was Material Turns Completely on Interpretation of the Local Law of the District of Columbia and Is Therefore Inappropriate for Review by this Court.

The question whether the evidence that Synanon destroyed was material to its complaint is properly decided on the basis of the purely local zoning regulations promulgated by the District government and of the purely local principles of equitable remedies and common law rules of contracts and torts expounded by the District's courts — matters this Court generally refrains from reviewing. The Court therefore should not grant certiorari to review the Superior Court's determination of materiality.

Whether evidence is material is determined with reference to the elements of the substantive claim in support of which the evidence is offered. *See, e.g., Weinstock v. United States,* 231 F.2d 699, 701 (D.C. Cir. 1956); *Reavis v. United States,* 395 A.2d 75, 78 (D.C. 1978); 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 401[04] (1985). In this case, the owners sought the evidence in question to help establish that Synanon was a violent organization. Proof of Synanon's policy of violence was to be offered to show that Synanon was not a non-profit

organization under D.C. zoning regulations, that it consequently could not use the building for offices as it intended, and that the owners' alleged misrepresentation that the building could be used for office purposes was not a material misrepresentation that could give rise to liability for fraud. The evidence was also to be introduced to prove that Synanon had lied when it held itself out to the owners as a peaceful, law-abiding organization and therefore that it had unclean hands that barred the granting of the equitable relief it sought. The issues of Synanon's status under the zoning rules, of the materiality of the owners' alleged misrepresentations, and of unclean hands as a defense to a claim of rescission all arise from local D.C. law, just as they would arise from state law had the events at issue occurred in Maryland, Virginia, or any of the other forty-eight states.

This Court treats the local law of the District of Columbia as functionally equivalent to state law. *Pernell v. Southall Realty,* 416 U.S. 363, 367-68 (1974). It has therefore been this Court's "longstanding practice . . . not [to] overrul[e] the local courts of the District on local law matters 'save in exceptional circumstances where egregious error has been committed.' " *Id.* at 368-69 (quoting *Fisher v. United States,* 328 U.S. 463, 476 (1946)); *see also United States v. Frady,* 456 U.S. 152, 159 n.8, 162 n.12 (1982); *Griffin v. United States,* 336 U.S. 704, 717 (1949). This case is by no means one of those few extraordinary cases in which this Court's review of questions of local D.C. law is warranted.

The Superior Court's citation of *Bob Jones University v. United States,* 461 U.S. 574 (1983), in its findings from the bench does not mean that its decision was based on federal law rather than the local law of the District of

Columbia. It is clear from the context in which *Bob Jones* was cited that the court relied on *Bob Jones* merely for its recognition of the long-standing common law rule that to qualify as a charity an organization's purposes must not violate public policy. *See id.* at 586-89, 591. The Superior Court looked to *Bob Jones* as analogous authority to be considered in determining the applicable rule of local D.C. law, and not as controlling authority as a matter of federal law. Synanon's long discussion of *Bob Jones* is therefore a red herring; *Bob Jones* does not provide a basis for the Court to review the decision below.[4]

III. The Question as to which Synanon Seeks Review Was Not Raised Below or Properly Presented in the Petition.

Even if the decision below raised a federal issue warranting review by this Court, certiorari should be denied because Synanon did not raise its constitutional

---

[4]Synanon's heavy reliance on *Bob Jones* is misplaced in other ways as well. Any limitations that the Court in that case might have implicitly put on the power of the Internal Revenue Service — an executive agency — to determine public policy are irrelevant to the power of courts of general jurisdiction, such as the Superior Court and Court of Appeals below, to interpret and declare the law of their jurisdiction. Indeed, the declaration of public policy has always been a central function of courts under the common law. Nothing in *Bob Jones* limits that power.

Finally, there is no basis for Synanon's claim that the dismissal violated its rights under the first amendment. Pet. 15-16. Contrary to Synanon's contention, the Superior Court did not dismiss the complaint because of discussions among Synanon's members about violence. Nor did the Superior Court find that such discussion showed that Synanon is a violent organization; in fact the court did not even reach the issue of whether Synanon had adopted a policy of violence. Rather, it dismissed the complaint because Synanon had wrongfully destroyed relevant evidence and lied about it to the court. The first amendment offers no protection for such conduct.

claim below. This Court will generally refuse to review questions raised here for the first time. *See, e.g., Delta Air Lines, Inc. v. August,* 450 U.S. 346, 362 (1981); *United States v. Santana,* 427 U.S. 38,.41,n.2 (1976); *Adickes v. S.H. Kress and Co.,* 398 U.S. 144, 147 n.2 (1970). Synanon did not argue in either the Superior Court or the Court of Appeals that, *as a matter of due process,* a complaint may not be dismissed due to destruction of evidence unless the evidence destroyed was material. Although Synanon argued below that the evidence it destroyed was not material, it never contended that the element of materiality was constitutionally required. The only due process argument that Synanon advanced in the Court of Appeals was the claim that it was denied an adequate hearing because it allegedly had no notice of the issues to be decided. Synanon has now abandoned that argument, however, as it is not listed as one of the Questions Presented. *See* S. Ct. R. 21.1(a) ("Only the questions set forth in the petition or fairly included therein will be considered by the Court."). Synanon's petition glosses over its failure to raise its constitutional argument in the courts below. It states that it had argued that the evidence destroyed was not material, but it neglects to mention that it never based that argument on the due process clause.

Moreover, Synanon failed to comply with the procedural rule requiring a detailed statement of how and when the federal question advanced in the petition was raised and decided in the court below. Supreme Court Rule 21.1(h) provides that when the petition seeks review of a state court judgment, the statement of the case must "specify the stages in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; [and] the method or manner of raising them and the way in which they were passed on by the court . . . ."

The local courts of the District of Columbia are regarded as state courts for the purposes of this Court's certiorari jurisdiction. 28 U.S.C. § 1257. Synanon was therefore required to comply with Rule 21.1(h), but has not made even a token effort to do so.

Synanon's failure to raise its due process objection below and to comply with the rules of this Court provide an independent reason why the Court should not review the decision of the Court of Appeals.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

Warren K. Kaplan
(Counsel of Record)
William Daniel Sullivan
Neal Goldfarb

Melrod, Redman & Gartlan
A Professional Corporation
1801 K Street, N.W.
Suite 1100K
Washington, D.C. 20006
(202) 822-5300

Attorneys for Respondents
Stuart A. Bernstein and
Samuel J. Kushner

May 30, 1986